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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Rules and Regulations Implementing
the Telephone Consumer Protection
Act of 1991

CC Docket No. 92-90

COMMENTS OF CABLE & WIRELESS COMMUNICATIONS, INC.

Cable & Wireless Communications, Inc., ("CWC") hereby submits its comments regarding the Petitions for Reconsideration filed by Xpedite Systems, Inc. ("Xpedite") and the Fair Fax Coalition ("Fair Fax")¹ with regard to certain aspects of the Commission's Report and Order² ("Order") in this proceeding governing unsolicited advertisements transmitted by facsimile. CWC supports Petitioners proposal that the Commission adopt a definition of the term "prior invitation or permission" in order to afford guidance to the public in employing this key element of the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227 ("TCPA"). The Commission should, if necessary, issue a further notice of proposed rulemaking to adopt the rule proposed by Xpedite. Moreover, the Commission should take administrative notice in this proceeding that the constitutional underpinnings of a related provision of the TCPA are under scrutiny

¹ Both petitions were filed November 23, 1992 and were published in the Federal Register on December 18, 1992.

² FCC 92-443 (released October 16, 1992)

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by the courts, and that the outcome of that analysis may have a direct bearing on the enforceability of the Commission's rules governing unsolicited facsimile advertising.

I. EXPRESSION OF INTEREST

CWC is a domestic and international interexchange carrier and enhanced service provider offering a broad range of telecommunications services oriented toward business users. Among these offerings is an enhanced facsimile service called Surefax³, which, among other capabilities, enables users to "broadcast" the same document to multiple recipients. Some of CWC's customers have employed this service to transmit promotional material to businesses they believe may have an interest in the particular services offered. For example, a national hotel chain promoting a time-critical special pricing program may use a facsimile broadcast to notify a wide range of travel agents. No other advertising medium provides comparable capabilities.

The broadcast capability has proved a popular and useful tool. Nevertheless, the TCPA has created uncertainty as to the scope of permitted uses of the facsimile broadcast services in connection with unsolicited advertising material. CWC suggests that Congress' delegation of rulemaking authority affords the Commission with sufficient latitude to adopt a framework of rules that enables end users to differentiate permissible from impermissible

³ Surefax is a registered trademark of Cable & Wireless Communications, Inc.

broadcasts of advertising material by fax. A keystone of such framework is a definition of the term "express invitation or permission."

II. THE COMMISSION SHOULD ADOPT A DEFINITION OF "PRIOR EXPRESS INVITATION OR PERMISSION"

The TCPA broadly prohibits the transmission of "unsolicited advertisements" to a telephone facsimile machine. 47 U.S.C. §447(b)(1)(B). This does not, however, constitute an absolute prohibition on transmission of facsimile advertising. The TCPA excludes from the prohibition advertising materials for which the recipient has provided "prior express invitation or permission." 47 U.S.C. §227(a)(2). Recognizing this factor in the Order, the Commission notes that "facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." Order at 28 n. 87.

CWC urges the Commission to provide additional guidance with respect to the elements of the "business relationships" test in determining invitation or permission to transmit advertising materials. While the TCPA does not afford the Commission authority to provide exemptions from the unsolicited advertisement prohibition, the Commission has the authority to establish rules clarifying the meaning of the TCPA, including the stated definitions.⁴ Establishing a definition of "prior express

⁴ See 47 U.S.C. §227(a)(2).

invitation or permission" is therefore both appropriate and necessary.

Xpedite's Petition proposes a four-pronged definition which focuses on the existence of a prior request or indication of interest, desire or willingness to receive advertising material by facsimile.⁵ Invitation or permission would be demonstrated by:

(1) an established business relationship between sender and receiver; (2) the recipient's provision to the sender of its facsimile telephone number through a published directory made available to the sender; (3) refusal to contact a toll free number to terminate further transmissions; and (4) other actions indicating recipient assent.⁶

Adoption of points one and two of the proposed definition appear supported by the existing record. The Commission has already ruled that the existence of a prior business relationship constitutes an invitation or permission in the context of facsimile,⁷ so the publication of a rule codifying this determination merely reflects current agency policy.⁸ With respect to point two, the Commission has also established that, in the

⁵ Xpedite Petition at 2-3.

⁶ Id.

⁷ Order at 28 n. 87.

⁸ CWC also supports Xpedite's recommendation that the Commission clarify its definition of "established business relationship" at §64.1200(f)(4) to include non-residential applications. This implements Commission policy stated in footnote 87 of the Order with respect to establishment of permission or invitation for fax advertisements.

context of artificial or prerecorded announcements, provision of a telephone number constitutes invitation or permission. Order at para. 31. Codification of these elements in the definitional section of the rules therefore creates no conflict with the Commission's prior determination.

III. THE TCPA CREATES FIRST AMENDMENT CONSIDERATIONS THE COMMISSION SHOULD CONSIDER IN THE CONTEXT OF THIS PROCEEDING

Subsequent to the release of the Order, a U.S. District Court issued a preliminary injunction⁹ barring the Commission from enforcing that provision of the TCPA prohibiting the use of artificial or prerecorded voice equipment to deliver messages to residential telephone lines absent the prior express consent of the called party.¹⁰ The court ruled that plaintiff had "raised serious questions about the constitutionality," of the law, and prohibited the FCC from enforcement action nationwide. Copies of the courts orders are attached.

While the injunction does not directly effect that portion of the TCPA governing transmission of unsolicited advertisements by facsimile, it sent up a red flag that the law could be fatally infirm. To the extent that §227(b)(1)(C) applies a comparable prohibition to facsimile as §227(b)(1)(B) applies to prerecorded voice, the enforceability of the former provision may be in doubt.

⁹ Moser, et al., v. F.C.C., Civil No. 92-1408-AS, slip op. (D. Oregon December 18, 1992); Moser, et al., v. F.C.C., Civil No. 92-1408-AS, slip op. (D. Oregon December 22, 1992).

¹⁰ 47 U.S.C. §227(b)(1)(B).

IV. CONCLUSION

The Commission should grant the Petitions for Reconsideration of Xpedite and Fair Fax to the extent that they request the Commission to adopt a definition of "prior express invitation or permission" for purposes of determining the willingness of a business to receive advertisements by facsimile. Congress has afforded the Commission sufficient latitude to adopt such a rule, and it would provide much needed guidance to the public in determining facsimile users' responsibilities under the law. Additionally, the Commission should take administrative notice in this proceeding of the U.S. District Court order enjoining the enforcement of a related provision of the TCPA.

Respectfully submitted,

C A B L E & W I R E L E S S
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January 4, 1993

CERTIFICATE OF SERVICE

I, Brenda Patton, hereby certify that I have caused copies of the foregoing "Comments on Petition for Reconsideration" to be served this 4th day of January 4, 1993, by first class mail, postage prepaid, unless otherwise indicated, to the following:

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A handwritten signature in cursive script, appearing to read "Brenda Patton", written in dark ink.

Brenda Patton